MENAH SULONG

v.

LIM SOO & ANOR.

FEDERAL COURT, KUALA LUMPUR
ONG CJ
GILL FJ
ALI FJ
[CIVIL APPEAL NO. 36 OF 1970]
6 JULY 1970

TORT: *Pleadings - Appeal - Total negligence alleged against defendant in pleadings - Issue of contributory negligence not raised - Opposing versions of accident - Finding in favour of defendant - Whether plaintiff bound by pleadings - Whether Judge's finding of fact ought to be reversed.*

This was an appeal against the decision of the learned trial Judge who, in a personal injury claim, found the defendant not negligent.

On 7 October 1963, the plaintiff was a passenger on the back carrier of an adult bicycle ridden by her nephew, a boy of 10 years. In her statement of claim, the plaintiff alleged that she had alighted from the bicycle and was standing on the grass verge when the car knocked her down resulting in a fracture of her right femur. This was denied by the defendant who claimed that the bicycle came out of junction without stopping and the negligence was on the part of the cyclist. The learned trial Judge found the plaintiff's version unreliable and found as a fact that the young cyclist never stopped at the junction but crossed the road even after he saw the approaching car. He therefore found that the negligence of the cyclist was the sole cause of the accident and the defendant driver was blameless and he dismissed the plaintiff's claim.

The issue was whether the trial Judge's finding of fact ought to be reversed.

Held:

[1] It is manifest that the trial Judge rejected the very basis of the appellant's claim - that she was an innocent bystander standing still on a spot not permitted for the passage of any vehicular traffic when she was knocked down. Since her case was put that way, and that way only, the trial Judge was, of course not at liberty to speculate where she was if, in truth, she was not on the grass. The issue before him required only a plain “yes” or “no”, to which he gave his answer.

[2] This Court is also of the opinion that the appellant was nowhere near or on the grass when the collision took place. If she was not, the ground must fall away completely from under her feet. It is not open to this Court to try and make out a case for her which she never adumbrated in her own pleadings, she herself having left no option for the trial Judge, or this Court, to treat the issue of contributory negligence as open.

[Appeal dismissed with costs.]

Cases referred to:
Esso Petroleum Co. Ltd. v. Southport Corporation [1956] 2 WLR 81
Tan Chow Soo v. Ratna Ammal [1969] 2 MLJ 49

For the appellant - Thara Singh Sidhu
For the respondents - M.J. Mathew

JUDGMENT

Ong CJ:

On 7 October 1963 the plaintiff was a passenger on the back carrier of an adult bicycle ridden by her nephew, a boy of about 10. It came out of a side-road, across the path of a motor-car proceeding along the highway from Malacca towards Machang Bharu. In the resulting collision the plaintiff sustained a fracture of her right femur.

Both in her statement of claim and repeatedly in her evidence she stated that she had alighted from the bicycle and was standing on the grass verge when the car knocked her down, being on its wrong side of the road when it did so. This allegation was denied by the defendants who averred that the bicycle came out without stopping at the junction, and the negligence was all on the part of the juvenile cyclist. In her reply the plaintiff still iterated that she was standing on the edge of the road when she was run down.

The learned trial Judge did not consider her evidence reliable or credible. He preferred to believe the defendants and found as a fact that the young cyclist never stopped at the junction but crossed the road even after he had seen the approaching car. In the result he found that the negligence of the cyclist was the sole cause of the accident and the defendant driver was in no way to blame. The claim was accordingly dismissed.

The appellant's complaints against the decision rest on the very ground which the Judge had found as a fact against her. The contention is still maintained by Counsel that she was "standing on the grass verge after having alighted from the bicycle" when she was hit by the motor-car. On this ground it is argued that the defendant driver was solely negligent and that the learned trial Judge should have so found against him.

I think it is necessary in this case to emphasise once again that the Courts should give their decisions in strict accordance with the pleadings. As Lord Radcliffe said in *Esso Petroleum Co. Ltd. v. Southport Corporation* [1956] 2 WLR 81, 91:

> If an Appellate Court is to treat reliance as pedantry or mere formalism I do not see what part they have to play in our trial system.

The statement of claim alleged against defendant driver total negligence - it was either that or nothing. That the Judge was not invited to consider the question of contributory negligence at all may clearly be seen in the arguments of Counsel at the trial. The grounds of appeal now before this Court likewise eschews that issue altogether.

The sole issue we have to decide, therefore, is whether or not we ought to reverse the trial Judge's finding of fact. Lord Diplock in *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49, 51 said:

> In this kind of case it is very rarely that an Appellate Court is justified in reversing the decision of the trial Judge who has had the opportunity of seeing and hearing the witnesses and who has directed himself correctly ...

Is there anything in this case which would justify us in substituting our own view of the facts for that of the trial Judge?

For one thing, it is manifest that he rejected altogether the very basis of the appellant's claim - that she was an innocent bystander standing still on a spot not permitted for the passage of any vehicular traffic when she was knocked down. Since her case was put that way, and that way only, the trial Judge was, of course, not at liberty to speculate where she

was if, in truth, she was not on the grass. The issue before him required only a plain "yes" or "no", to which he gave his answer. In his view "the bicycle must have travelled across nearly half the road" to cause the accident. Accordingly he held the defendant not negligent in all the circumstances.

We are also of the opinion that the appellant was nowhere near or on the grass when the collision took place. If she was not, the ground must fall away completely from under her feet. It is not open to this Court to try and make out a case for her which she never adumbrated in her own pleadings, she herself having left no option for the trial Judge, or this Court, to treat the issue of contributory negligence as open.

Accordingly this appeal is dismissed with costs.

Also found at [1983] 1 CLJ 26